

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

<p>IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION</p>	
<p>THIS DOCUMENT RELATES TO:</p> <p><i>The City of New York v. Abbott Laboratories, Inc., et al.</i> S.D.N.Y. Case No. 04-CV-06054</p> <p><i>County of Albany v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0425</p> <p><i>County of Allegany v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0236</p> <p><i>County of Broome v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0456</p> <p><i>County of Cattaraugus v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0256</p> <p><i>County of Cayuga v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0423</p> <p><i>County of Chautauqua v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-0214</p> <p><i>County of Chemung v. Abbott Laboratories, Inc., et al.</i> W.D.N.Y. Case No. 05-CV-6744</p> <p><i>County of Chenango v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0354</p> <p><i>County of Columbia v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0867</p> <p><i>County of Cortland v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0881</p> <p><i>County of Dutchess v. Abbott Laboratories, Inc., et al.</i> S.D.N.Y. Case No. 05-CV-6458</p> <p><i>County of Essex v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0878</p> <p><i>County of Fulton v. Abbott Laboratories, Inc., et al.</i> N.D.N.Y. Case No. 05-CV-0519</p>	<p>MDL NO. 1456 Civil Action No. 01-12257-PBS</p> <p>Judge Patti B. Saris</p> <p><b>PLAINTIFFS' JOINT SURREPLY IN FURTHER OPPOSITION TO DEFENDANT FOREST LABORATORIES, INC. AND FOREST PHARMACEUTICALS, INC.'S INDIVIDUAL MOTION TO DISMISS</b></p>

*County of Genesee v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-00267

*County of Greene v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0474

*County of Herkimer v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-00415

*County of Jefferson v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0715

*County of Lewis v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0839

*County of Madison v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-00714

*County of Monroe v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6148

*County of Nassau v. Abbott Laboratories, Inc., et al.*  
E.D.N.Y. Case No. 04-CV-05126

*County of Niagara v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-06296

*County of Oneida v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0489

*County of Onondaga v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0088

*County of Ontario v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6373

*County of Orleans v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6371

*County of Putnam v. Abbott Laboratories, Inc., et al.*  
S.D.N.Y. Case No. 05-CV-04740

*County of Rensselaer v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-00422

*County of Rockland v. Abbott Laboratories, Inc., et al.*  
S.D.N.Y. Case No. 03-CV-7055

*County of Schuyler v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6387

*County of Seneca v. Abbott Laboratories, Inc., et al.*

W.D.N.Y. Case No. 05-CV-6370

*County of St. Lawrence v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0479

*County of Saratoga v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0478

*County of Steuben v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6223

*County of Suffolk v. Abbott Laboratories, Inc., et al.*  
E.D.N.Y. Case No. 03-CV-12257

*County of Tompkins v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0397

*County of Ulster v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 06-CV-0123

*County of Warren v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0468

*County of Washington v. Abbott Laboratories, Inc., et al.*  
N.D.N.Y. Case No. 05-CV-0408

*County of Wayne v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-06138

*County of Westchester v. Abbott Laboratories, Inc., et al.*  
S.D.N.Y. Case No. 03-CV-6178

*County of Wyoming v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-6379

*County of Yates v. Abbott Laboratories, Inc., et al.*  
W.D.N.Y. Case No. 05-CV-06172

The reply brief of Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc. (“Forest”) misrepresents this Court’s particularity requirements for AWP fraud and mischaracterizes plaintiffs’ allegations supporting plaintiffs’ best price fraud.

### **I. The Allegations of Wholesale Pricing/AWP Fraud are More Than Sufficient**

Forest misstates the Court’s particularity requirements in two primary ways. *First*, Forest quotes the Court’s Suffolk II opinion, *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 01-12257, 2004 WL 2387125 (D. Mass. Oct. 26, 2004) (“*Suffolk II*”), as supporting its view that plaintiffs are required to allege a spread for each drug at issue. *Second*, for those drugs which Plaintiffs do allege a spread, Forest claims the spread is insufficiently particular because plaintiffs have not alleged a spread for each time period at issue.

Forest is incorrect on both counts. This Court held that Fed. R. Civ. P. 9(b) was met when “[p]laintiffs ... identify particular allegedly-fraudulent conduct on the part of each **Defendant**” (as opposed to drug-by-drug allegations of fraud). The Court specifically held that pleading a spread for every single drug was not required in the MDL class case, stating that “the Court rejects arguments that Plaintiffs must allege a specific spread for each drug, so long as sufficient facts were alleged to infer a fraudulent scheme by each particular Defendant manufacturer.” *See In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F.Supp.2d 196 at 209 (D. Mass. 2004)(“*Pharm III*”). Forest’s claim that spreads are required for each specific drug simply does not square with this language.

The ruling above also defeats Forest’s claim that a spread for each and every drug is required in all time periods. If something is not required at all, it certainly cannot be comprehensively required. Furthermore, as stated in plaintiffs’ Forest-specific opposition (“Opp.”) at 3, this Court has held that comprehensive pleading is not required. *See Pharm III* at 208, *quoting U.S. ex rel. Franklin v. Parke Davis*, 147 F.Supp.2d 39, 49 (D.Mass. 2001)(Saris, J.) (“[W]here the alleged

scheme of fraud is complex and far-reaching, pleading every instance of fraud would be extremely ungainly, if not impossible.”)

As illustrated in great detail in their Opp., plaintiffs have pleaded facts that support fraudulent AWP claims with more than sufficient specificity to meet the requirements of Fed. R. Civ. P. 9(b) as well as the Court’s prior rulings in *Suffolk*.<sup>1</sup> See Opp at 2-3.

## **II. Plaintiffs Fraud Based Best Price Claims**

Plaintiffs’ response to Forest’s attack on their Best Price/Rebate claims is set forth in Point IV of their consolidated sur-reply, which is incorporated herein.

### **CONCLUSION**

For the reasons set forth herein and in Plaintiffs’ Opposition Memorandum, Forest’s individual reply motion to dismiss should be denied in its entirety.

Dated: June 2, 2006.

Respectfully submitted,

**City of New York and all captioned Counties  
except Nassau, by**

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**For the City of New York**

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<sup>1</sup> See *In re Pharm. Indus. Average Wholesale Price Litig.*, 339 F.Supp.2d 165 (“*Suffolk I*”); *Suffolk II* 2004 WL 2387125; *In re Pharm. Indus. Average Wholesale Price Litig.*, Memorandum and Order (D. Mass. April 8, 2005)(“*Suffolk III*”)

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